IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date:- 23 .11.2007

Coram

The Honourable Mr. Justice M. VENUGOPAL

C.R.P. NPD. No.1677 of 2003
and
C.M.P. No.17647 of 2003

S. Anusuya ... Petitioner

..vs..

Arulmighu Renuka Parameshwari
Devasthanam,
rep. by its Hereditary Trustees
N.L. Vasanthammal ... Respondent

Petition to set aside the order dated 29.11.2002 passed in M.P. SR.No.5147 of 2002 in Eject. suit No.83 of 1990 on the file of the IV Small Causes Court, Chennai.

For Petitioner : Mr. R. Subramanian
For Respondent : N.A.

O R D E R

The civil revision petitioner is the legal heir of the deceased father Narasimhalu, who was the defendant in Ejectment Suit No.83 of 1990 on the file of the IV Small Causes Court, Chennai.

2. The respondent/ plaintiff has filed a suit in Ejectment Suit No.83 of 1990 for recovery of possession from Narasimhalu. The said Narasimhalu died on 9.12.1989 and hence, M.P. No.1288 of 1990 was filed to bring on record his daughter/the civil revision petitioner as his legal heir. The said miscellaneous petition was allowed on 18.11.99. Later, M.P. No.2386 of 1999 was filed by the respondent/plaintiff to carry out amendment and was allowed on 23.12.99. On 16.9.2002, an ex parte decree was passed against the petitioner in Ejectment Suit No.83 of 1990. Earlier the petitioner who was impleaded as 2nd defendant by paper publication was set ex parte on 28.6.2000. It is contended that the revision petitioner was not directly served with summons through Court and she never resided at No.45, N.S.C. Bose Road, Madras - 600 079. The revision petitioner, on coming to know about the passing of ex parte

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decree on 19.9.2002, filed a petition in M.P.SR.No.5147 of 2002 to set aside the said ex parte decree, stating that the suit summons were not served on her and on coming to know about the ex parte decree, immediately, she has filed the petition. However, the said petition was rejected by the learned Judge, Fourth Court of Small Causes, Chennai on 29.11.2002. Aggrieved over the same, the present civil revision petition has been brought forth by the petitioner in revision.

3. It is represented by the learned counsel for the petitioner that when a petition was filed under Order 9 Rule 13 of the Civil Procedure Code before the Lower Court to set aside the ex parte decree passed against the defendant, learned Judge ought to have numbered the said petition and ordered notice to the other side and thereafter, dispose of the same. Without doing so, the learned Judge has dismissed the said petition at the S.R. stage itself.

4. According to the learned counsel for the petitioner, the learned Judge, though passed a detailed order, the same was passed without ordering notice to other side. Hence, the question that arises for consideration before this Court is whether the petition filed under Order 9 Rule 13 of the Civil Procedure Code can be dismissed at the S.R. Stage itself without numbering the same?

5. Learned counsel for the petitioner pressed into service Section 122 of the Civil Procedure Code, which runs as follows:-

> " Power of certain High Courts to make rules:-
>
> High Courts not being the Court of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule."

6. He also drew the attention of this Court to Rule 32 of the Civil Rules of Practice, which runs as follows:-

> " Proof of facts by affidavit:-
> Any fact required to be proved upon an interlocutory proceeding shall, unless otherwise provided by these rules, ordered by the court, be proved by affidavit, but the judge may, in any case, direct evidence to be given orally; and thereupon the evidence shall be recorded and exhibits marked, in the same manner as in a suit and lists of the witnesses and exhibit shall be prepared and annexed to the judgment."

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7. It is not in dispute that the revision petitioner is the legal heir of the deceased Narasimhalu. According to the learned counsel for the petitioner, the order passed by the learned Judge in S.R. stage itself is without jurisdiction. It is represented that the averments mentioned in the petition filed under Order 9 Rule 13 of the Civil Procedure Code to set aside the ex parte decree dated 16.9.2002 passed against the petitioner are required to be proved and since no opportunity was given to the revision petitioner to prove her case, the dismissal of the said petition at the S.R. stage is per se illegal. Reliance was placed on the decision reported in the case of KARUPPASWAMY & ORS. v. C.RAMAMURTHY (A.I.R. 1993 SC 2324), wherein it is held as follows:-

> " Limitation Act (1963), S.21(1), Proviso - Applicability - Suit filed against dead person - Plaintiff becoming aware of defendant's death from remark on returned summons - Seeking impleadment of LRs of defendant, promptly thereafter - entitled to invoke proviso gto S.21(1)."

8. A perusal of the order passed by the learned Judge at the S.R. stage itself clearly spells out that the learned Judge has perused the records in Ejectment Suit No.83 of 1990 and thereafter passed a detailed order on 29.11.2002 and rejected the petition. But, the principles of natural justice require that an opportunity should be given to the petitioner to prove her case, based on the averments made in the affidavit filed in support of the petition to set aside the ex parte decree. Without taking the said petition on file and without numbering the same, the order passed by the learned Judge at threshold, which, in the considered opinion of this Court, is not correct.

9. No doubt, the learned Judge, IV Court of small Causes, Chennai, while passing orders on 29.11.2002 by rejecting the petition to set aside the ex parte decree, traversed on the factual details of the matter, but the same was done unilaterally. While dealing with the petition filed under Order 9 rule 13 of the Civil Procedure Code, the proper procedure to be adopted by the learned trial Judge is to assign a number, take it on file, order notice to the other side and after hearing the matter on merits, arrive at a conclusion and dispose of the same within the parameters of law.

10. As far as the present case is concerned, such a course was not adopted by the learned trial Judge. While dealing with the unnumbered petition at S.R. stage and passing orders, the learned Judge, IV Court of Small Causes has failed to exercise his jurisdiction so vested in law without giving an opportunity to prove the averments made in the affidavit, by letting in oral or documentary evidence, if any on both sides.

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11. Hence, this Court, sitting in revision, perforce to interfere with the order passed by the learned trial Judge and allow the civil revision petition, by setting aside the order dated 29.11.2002 passed in M.P. SR.No.5147 of 2002 in Eject. suit No.83 of 1990 on the file of the IV Small Causes Court, Chennai, to promote substantial cause of justice and to prevent aberration of justice. Consequently, the connected C.M.P. is closed.

12. In fine, the learned trial Judge, IV Small Causes Court, Chennai is directed by this Court to take up the petition in M.P.SR.No.5147 of 2002 in Ejectment Suit No.83 of 1990 on file and dispose of the same on merits according to law after giving opportunity to other side to file counter and permit the parties to adduce oral and documentary evidence, if any, to effectually and completely adjudicate the matter in issue as expeditiously as possible. No costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

ssa.

To

1. The Judge,
IV Small Causes Court,
Chennai.

2. The Record Keeper,
V.R.Section, High Court, Madras.

1 cc To Mr.R.Subramanian, Advocate, SR.69727.

C.R.P. NPD. No.1677 of 2003
and connected C.M.P.

SP(CO)
RVL 29.11.2007

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